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No. 88-927

In the Supreme Court of the United States

OCTOBER TERM, 1988

KEYSTONE SHIPPING CO.,
PETITIONER,

v.

NEW ENGLAND ENERGY INC., AND
NEW ENGLAND POWER COMPANY,
RESPONDENTS.

**On Writ of Certiorari to
The United States Court of Appeals
For the First Circuit**

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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An Intolerable Conflict Exists Among the Circuits Concerning the Proper Interpretation of Section 4 of the Federal Arbitration Act.

1. The presence of a state statute does not remove the conflict between the First Circuit's decision in this case and the Ninth Circuit's decision in *Weyerhaeuser Co.* v. *Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984), and the Fifth Circuit's decision in *Del E. Webb Construction* v. *Richardson Hospital Authority*, 823 F.2d 145 (5th Cir. 1987) (Br. Opp. at 12-13). The conflict arises from the First Circuit's interpretation of the phrase in Section 4 of the Federal Arbitration Act ("Federal Act"), 9 U.S.C. §4 (1982), "in accordance with the terms of the agreement" to

mean not contradicted by the terms of the arbitration agreement.[1] Such an interpretation of Section 4 conflicts with the plain and ordinary meaning of the statutory language and the decisions of the Ninth Circuit in *Weyerhaeuser* and the Fifth Circuit in *Del E. Webb*. These decisions interpret the same language of Section 4 as requiring contractual consent to consolidated arbitration.

Contract Interpretation Is Not at Issue.

2. Respondents' suggestion that differences in contract interpretation account for the conflict between the circuits (Br. Opp. at 14, 15) is in error. The district court specifically found that the terms of the parties' arbitration agreements did not authorize consolidation (App. at A-22). The court of appeals made no contrary determination[2] and the district court's interpretation remains as the controlling interpretation of the parties' arbitration agreements in the record.

The Authority and Procedures of the Federal Courts Are Set by Congress and Not by the States, and Therefore a Traditional Preemption Analysis Is Inappropriate.

3. Respondent's preemption arguments are misdirected (Br. Opp. at 7-9). The issue is not whether all state arbitration law is broadly preempted, but what law is to be applied by the federal courts. In *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967), this Court stated the applicable rule as follows: "Federal courts are bound to apply rules enacted by Congress with respect to matters—here, a contract involving commerce—over which it has legislative power."

The court of appeals' decision to "supplement" the Federal Act with procedures taken from state arbitration law (App. at

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[1] The court of appeals held "that an order not contradicting the contractual terms regarding arbitration" is "in accordance with [those] terms" (App. at A-6).

[2] The court of appeals stated: "Our assumption in this case is that the parties' contracts are, in fact, silent on the issue of consolidation" (App. at A-10).

A-5 n.2) cannot be supported by traditional preemption analysis. Contrary to Respondents' position that a state procedural statute should be applied by the federal courts (Br. Opp. at 7 n.6), the Federal Act can comprehensively control the authority of the federal courts without regard to whether there is a direct conflict with state procedural law. *See Stewart Organization, Inc.* v. *Ricoh Corporation*, 108 S.Ct. 2239 (1988).

Despite the Federal Act's silence on numerous issues, federal courts have consistently rejected application of local state law to determine the substantive and procedural rules governing arbitration agreements within the ambit of the Federal Act. The courts have adopted this position without finding it necessary to apply a traditional preemption analysis. *See Huber, Hunt & Nichols, Inc.* v. *Architectural Stone Co.*, 625 F.2d 22, 25-26 (5th Cir. 1980) (consolidation); *Ore & Chemical Corporation* v. *Stinnes Interoil, Inc.*, 606 F. Supp. 1510, 1515 n.5 (S.D.N.Y. 1985) (consolidation). Even where state law does not differ from federal law developed under the Federal Act, federal law, and not state arbitration law, has been held to control. *See Boston and Maine Corp.* v. *Chicago, Burlington and Quincy Railroad Co.*, 381 F.2d 365, 366 (2d Cir. 1967), *cert. denied*, 390 U.S. 1027 (1968) ("We believe we are required to point out...that... we, unlike the district judge who ordered its enforcement according to the law of New York, would have ordered enforcement under the Federal Arbitration Act"). *See also Michele Amoruso e Figli* v. *Fisheries Development Corp.*, 499 F. Supp. 1074, 1080 n.9 (S.D.N.Y. 1980) (time limit in state arbitration act for contesting arbitrability not controlling); *Collins Radio Co.* v. *Ex-Cell-O Corp.*, 467 F.2d 995, 997 (8th Cir. 1972) (state requirement for attorney advice and consent not controlling); *Paul Allison, Inc.* v. *Minikin Storage of Omaha, Inc.*, 486 F. Supp. 1, 4 (D. Neb. 1979) (procedure under state arbitration act to validate an award not controlling).

As this Court indicated in interpreting a federal procedural statute (28 U.S.C. §1291) in *Budinich* v. *Becton Dickinson and Co.*, 108 S.Ct. 1717 (1988), the proper inquiry is whether, in using the phrase (in Section 4) "in accordance with the terms of the agreement" Congress meant to "borrow or incorporate state law." *Id.* at 1720. As in *Budinich*, the "context of its use makes such a reference [to state law] doubly implausible, since that provision applies to all federal litigation and not just diversity cases." *Id.* Moreover, the testimony in the congressional hearings specifically indicated that existing law provided that the "Federal court will not be bound by any State statute." *Arbitration of Interstate Commercial Disputes, Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary*, 68th Cong., 1st Sess., 16 (1924) (statement of Mr. Cohen, American Bar Association).

The Federal Act Provides for a Uniform Federal Law.

4. Respondents' refusal to acknowledge a comprehensive and uniform body of federal law under the Federal Act (Br. Opp. at 10) is misguided. As Justice O'Connor stated in *Southland Corp.* v. *Keating*, 465 U.S. 1, 34 (1984) (O'Connor, J., dissenting), "[t]he drafters' plan for maintaining reasonable harmony between state and federal practices was not to bludgeon States into compliance, but rather to adopt a uniform federal law. . . ."

Application of a Massachusetts Procedural Statute by a Federal Court Conflicts With Controlling Federal Law.

5. Respondents' assertion that the Federal Act is solely concerned with arbitrability (Br. Opp. at 6 and 10) ignores the comprehensive procedural nature of the Federal Act. *See Southland*, 465 U.S. at 23 (O'Connor, J., dissenting) ("Congress thought it was exercising its powers to dictate either procedure or 'general federal law' in federal courts").

The court intervention which results from application of the Massachusetts statutory provision for consolidation without contractual consent[3] is, at the very least, inconsistent with the congressional intent to minimize judicial "interference." H.R. Rep. No. 96, 68th Cong., 1st Sess. 2 (1924). As a result arbitration will become more like litigation and a party's desire to avoid the courts less likely to be realized.

The court of appeals itself recognized that there is a substantial conflict between its view of the role of the federal courts under the Federal Act and what it characterized as the "hands off" view expressed in the decisions of the Ninth and Fifth Circuits in *Weyerhaeuser* and *Del E. Webb* (App. at A-8).

Conclusion

For the reasons more fully set forth in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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[3] The court of appeals held that "consent is not a prerequisite to application of the Massachusetts consolidation statute" (App. at A-11).